

ENVIRONMENTAL PROTECTION COMMISSION [567]

Adopted and Filed

Pursuant to the authority of Iowa Code section 455B.105(3), the Environmental Protection Commission hereby adopts amendments to Chapter 64, “Wastewater Construction and Operation Permits,” Iowa Administrative Code.

Amendments to Chapter 64 reissue General Permits Nos. 1, 2 and 3 which authorize the discharge of storm water. General Permits 1 and 2 were issued in 1992 for a five-year duration, were reissued in 1997 and again in 2002 for additional five-year periods, and expire October 1, 2007. General Permit No. 3 was issued in 1997 for a five-year duration, reissued in 2002 for an additional five-year period, and expires October 1, 2007. This action will renew all three, extending their coverage another five years to October 1, 2012. General permits for storm water discharges are required to be adopted as rules and are effective for no more than five years as specified in the Code of Iowa. Also, the stipulation that storm water discharge may commence 24 hours after the applicant submits the Notice of Intent for Coverage has been removed and replaced with a requirement that discharge cannot commence until the discharge authorization has been issued by the Department.

These amendments to Chapter 64 also add a provision to subrule 64.6(6) which requires compliance responsibility transfers to be sent to the Department. Since 1999, land developers have been required to notify the Department when responsibility for compliance with the terms of General Permit no. 2 has been contractually transferred to those who have purchased lots within residential or commercial developments. These amendments allow the seller of the lots to transfer responsibility for maintaining permit coverage to the buyer of the lots. The reference to the minimum area required to be permitted is also being changed from five acres to one acre to

reflect current federal and state regulation requirements. These amendments also remove the requirement that a Notice of Intent be submitted 24 hours prior to the date operation is to begin and remove the automatic authorization of storm water discharge upon submittal of a complete Notice of Intent.

The fee structure of the current permits has been retained.

It is not the intent of the Department that the textual changes in the general permits be adopted in the Iowa Administrative Code but that these changes be made in the general permits themselves which are adopted by reference.

The Notice of Intended Action was published in the Iowa Administrative Bulletin on February 28, 2007 as ARC 5753B. Comments regarding these amendments were received during the comment period and at the public hearing on March 30, 2007. The comments and the Department's response are contained within the responsiveness summary. There is one change from the Notice of Intended Action resulting from the public comments. The following wording has been inserted at the end of the proposed 64.6(6)c. :

“and the transferor's authorization issued under NPDES General Permit No. 2 for, and only for, the transferred property, shall be deemed by the department as being discontinued without further action of the transferor.”.

This has been inserted to clarify the intent of the Department.

These amendments become effective October 1, 2007.

This amendment is intended to implement Iowa Code section 455B.103

The following amendments are adopted.

ITEM1. Amend subparagraph 64.3(4)b.(4) as follows:

64.3(4)b.(4) For storm water discharge associated with industrial activity which initiates operation after October 1, 1992, with the exception of discharges identified in subparagraphs (2) and (3) of this paragraph, at least 24 hours prior to the date operation is scheduled to begin where storm water discharge associated with industrial activity could occur as defined in rule 567---60.2.

ITEM 2. Amend subrule 64.6(2) as follows:

64.6(2) *Authorization to discharge under a general permit.* Upon the submittal of a complete Notice of Intent in accordance with 64.6(1) and 64.3(4)“b,” the applicant is authorized to discharge, unless notified by the department to the contrary after evaluation of the Notice of Intent by the department is complete and the determination has been made that the contents of the Notice of Intent satisfy the requirements of 567---Chapter 64. The discharge authorization date for all storm water discharges associated with industrial activity that are in existence on or before October 1, 1992, shall be October 1, 1992. The applicant will receive notification by the department of coverage under the general permit. If any of these items required for filing a Notice of Intent specified in 64.6(1) are missing, the department will consider the application incomplete and will notify the applicant of the incomplete items.

ITEM 3. Amend subrule 64.6(6) as follows:

64.6(6) *Transfer of ownership – construction activity part of a larger common plan of development.* For construction activity which is part of a larger common plan of development, such as a housing or commercial development project, in the event a permittee transfers ownership of all or any part of property subject to NPDES General Permit no. 2, both the permittee and transferee shall be responsible for compliance with the provisions of the general

permit for that portion of the project which has been transferred, including when the transferred property is less than ~~five~~one acres in area, from and after the date the department receives written notice of the transfer, provided that:

- a. The transferee is notified in writing of the existence and location of the general permit and pollution prevention plan, and of the transferee's duty to comply and proof of such notice is included with the notice to the department of the transfer.
- b. If the transferee agrees, in writing, to become the sole responsible permittee for the property which has been transferred, then the transferee shall be solely responsible for compliance with the provisions of the general permit for the transferred property from and after the date the department receives written notice of the transferee's assumption of responsibility.
- c. If the transferee agrees, in writing, to obtain coverage under the NPDES General Permit no. 2 for the property which has been transferred, then the transferee is required to obtain coverage under the NPDES General Permit no. 2 for the transferred property from and after the date the department receives written notice of the transferee's assumption of responsibility for permit coverage. After the transferee has agreed, in writing, to obtain coverage under the NPDES General Permit no. 2 for the transferred property and the department has received written notice of the transferee's assumption of responsibility for permit coverage for the transferred property, the authorization issued under the NPDES General Permit no. 2 to the transferor for the transferred property shall be considered by the department as not providing NPDES permit coverage for the transferred property and the transferor's authorization issued under NPDES General Permit No. 2 for, and only for, the transferred property, shall be deemed by the department as being discontinued without further action of the transferor.

- d. All notices sent to the department as described in this subrule shall contain the name of the development as submitted to the department in the original Notice of Intent as modified by subsequent written notices of name changes submitted to the department, the authorization number assigned to the authorization by the department, the legal description of the transferred property including lot number, if any, and any other information necessary to precisely locate the transferred property and to establish the legality of the document.

ITEM 4. Amend subrules 567--64.15(1), 64.15(2) and 64.15(3) as follows:

64.15(1) Storm Water Discharge Associated with Industrial Activity, NPDES General Permit No. 1, effective October 1, ~~2002~~07 to October 1, ~~2007~~12.

64.15(2) Storm Water Discharge Associated with Industrial Activity for Construction Activities, NPDES General Permit No. 2, effective October 1, ~~2002~~07 to October 1, ~~2007~~12.

64.15(3) Storm Water Discharge Associated with Industrial Activity from Asphalt Plants, Concrete Batch Plants and Rock Crushing Plants, NPDES General Permit No. 3, effective October 1, ~~2002~~07 to October 1, ~~2007~~12.

Date

Rich Leopold, Director

RESPONSIVENESS SUMMARY

Introduction:

This is a summary of the comments received in response to proposed changes to chapter 567-64 of the Iowa Administrative Code which renew the storm water general permits, make changes to the general permits and amend rules regarding storm water. The Notice of Intended Action (ARC 5753B) was published on February 28, 2007.

The amendments as proposed in the Notice would:

1. Re-adopt the storm water general permits nos. 1, 2 and 3 for another five year period to October 1, 2012.
2. Remove the provision that authorization is automatically granted 24 hours after a properly completed application is received and replace it with the provision that operation or construction cannot commence prior to approval of the permit authorization application.
3. Add a new provision that recognizes agreements between sellers and buyers of lots contained within a development to transfer responsibility for obtaining permit coverage to the buyers if they agree to the transfer.
4. Change a provision in General Permit no. 2 that allows up to two days for a permittee to produce the pollution prevention plan upon request by the Department. This will be reduced to three hours.
5. Incorporate minor textual changes to update the general permits.

One public hearing was held in Des Moines on March 30, 2007. Written comments were received through March 30, 2007.

Eight entities provided written comments on the proposed changes (their names are listed at the end of this summary). The responsiveness summary attempts to address all of the comments received. The comments received are addressed below in terms of the issues involved. The Department did not list every comment received, but rather merged common comments into major issue areas. The Department did attempt to address every technical and miscellaneous question or comment received.

The questions and comments were sorted into common topics and the Department's response is written below each topic section or individual question in the miscellaneous section.

Maximum time for the Department to issue authorizations not defined:

- A specific duration is needed to ensure contractors and contracting agencies can effectively plan construction activities. We would recommend that a defined period be established to address this issue.
- With no timetable provided, a builder, developer, lot owner is at the mercy of the Department for a response which could be 24 hours, 1 week, 2 weeks, 1 month or longer. There is no maximum time allowed for review. This is followed by the fact that the city will not issue their respective permits until the DNR authorization has been issued.
- However, especially in cases associated with construction related activities covered under General Permit #2, this adds an additional time uncertainty into what is often a tight project schedule.

- Given the current staffing shortfalls and budgetary constraints at Iowa DNR, this amended sub-rule could lead to prolonged delays in regulated entities obtaining general permits for storm water coverage.
- The related Code of Federal Regulations for general permits also clearly state that general permits “shall specify...the date(s) when a discharger is authorized to discharge under a permit.”
- In order to avoid costly business disruptions we would like to see a timeline included in the rules to ensure that the evaluations and determinations are made in a timely fashion. A reasonable time frame for such consideration would be seven (7) days.

Department’s response:

The amount of time between receipt of the applications and issuance of the authorizations by the storm water program is typically 1-2 business days. It is not anticipated that this will significantly increase. No other NPDES permits issued by the Department are issued automatically after receipt of the applications. The current rules allow construction to commence 24 hours after an application has been submitted. Approximately 1/3 of storm water permit applications received by the Department are incomplete which often results in commencement of construction without a permit or valid pollution prevention plan. The proposed rule change should significantly reduce these occurrences. Major construction projects require time, planning and completion of many tasks, including regulatory measures, prior to commencement. Many of these steps also require undetermined amounts of time to accomplish. In the proposed rule, the date the discharger is authorized to discharge is clearly defined as the date the Department determines the application is complete.

The proposed rule regarding transfer of responsibility to obtain permit authorization is insufficient or ill advised:

- It would be appropriate for the transferor’s NPDES permit to be discontinued for that transferred property. However, it would be possible to reach the same result without requiring the transferor to actually file a Notice of Discontinuation with the Department which would then need to be filed and, in some manner, tracked by the Department. The proposed additional wording, added at the end of the Department’s proposed paragraph 64.6(6)c, is as follows:

...and the transferor’s NPDES General Permit No. 2 for the transferred property shall be deemed discontinued without further action of the transferor.

- The larger potential volume of General Permit No. 2 could also create an undue hardship for MS4 communities (42 cities and the 3 state universities defined as municipal separate storm sewer systems by the EPA as being required to conduct their own construction site compliance programs) that are required to conduct initial SWPPP and permit reviews as well as conduct biannual or quarterly inspections of all General Permit No. 2 holders within their corporate limits.
- We have concerns with this rule allowing developers to transfer responsibility for storm water, including allowing the builder to obtain their own individual NPDES General Permit No. 2. This will benefit developers, however it will increase costs to homebuilders which, in turn, will likely be passed on to the home buyer.
- Under this proposed rule change, there could be numerous NPDES General Permit No. 2 holders, making it increasingly difficult for city enforcement staff to determine who is responsible for cleaning any sediment in the street and delays in getting compliance with storm water regulations.

Department's response:

MS4 communities are already required to review SWPPPs and conduct compliance inspections for individual lots if the lot buyers agreed to take responsibility for compliance with a developer's existing General Permit No. 2 under the current rule. Those MS4 communities that are not already reviewing SWPPPs and conducting compliance reviews under these circumstances are out of compliance with their MS4 permits. The proposed rule will not require lot buyers to obtain their own authorizations under General Permit No. 2 but simply allows them the option of obtaining their own coverage or relying upon the developer's coverage, as they wish. Thus, any increased cost associated with obtaining their own authorizations under General Permit No. 2 is strictly their choice.

The Department shall add the following language at the end of the proposed paragraph 64.6(6)c:

...and the transferor's authorization issued under NPDES General Permit No. 2 for, and only for, the transferred property, shall be deemed by the department as being discontinued without further action of the transferor.

Requirement to produce the pollution prevention plan within three hours of request for inspection is an insufficient amount of time:

- 3 hours is not sufficient time for a plan that is held at the corporate office for updating to be brought to a site. We recommend the time frame remain at 2 days or a minimum of 24 hours.
- Three hours is simply an insufficient amount of time to supply such documentation. A vast majority of our members are small businesses with limited staff and resources. Further, our members often work on projects that may be at least a two or three hour drive from their offices where the documentation is secured. The proposed amendment will impact them the most as they will have to sacrifice valuable project time to produce the documents or face a potentially devastating work stoppage.

Department's response:

The current requirement is that the plan be kept at the work site if a construction shed or trailer is present. If such is not present, it is allowed that the plan be kept off-site but produced within two days of the request. It has been suspected by both Department and city inspectors that sometimes these plans have been written after being requested. It is required that the plan be implemented prior to commencement of construction. As with building plans and other types of plans needed for construction, to be properly implemented, the plan must both exist and be readily available to on-site personnel. Thus, the plan must be present at the construction site in a building, mailbox or vehicle. Department inspectors must sometimes drive for hours to reach these sites and reviewing a plan that is not readily available becomes problematic.

Miscellaneous comments:

- A change is proposed for Part IV.A.2. in which the requirement for the SWPPP to provide for compliance with the terms and schedule of the plan with the initiation of construction activities is changed to compliance with the terms and schedule of the plan prior to the initiation of construction activities. It would seem appropriate to retain the current stipulation of compliance with the initiation of construction activities as there may be elements of the plan that are not applicable until later in the construction sequencing.

Department's response:

Many provisions contained within the SWPPP are to be implemented later in the construction cycle. However, the schedule of activities and the specific provisions of these activities must be contained in the SWPPP. The proposed change does not require the provisions be implemented prior to initiation of construction but requires the terms and schedule of activities be included in the plan prior to initiation of construction activity. Some provisions in the SWPPP must be in place prior to initiation of construction activity.

- It is disappointing that the Department chose to propose the rule changes using a stakeholder group not involving the cities.

Department's response:

The statement is a non sequitur since 5 cities were included in the stakeholder group.

Comments not relevant to the current rulemaking:

- We request that preclusions in addition to snow cover for initiation of stabilization measures be added such as for frozen ground and muddy conditions.
- We maintain that the phrase "at all times" in the requirement in General Permit No. 2 that "The permittee shall at all times properly operate and maintain all facilities and systems of treatment...", is an unachievable requirement. We also request an additional section that divides operation and maintenance.
- We request adding a shorter authorization period of 6 or 9 months since a typical home will not require a full 1 year authorization before completion.
- Have all approvals faxed or e-mailed to the regulated entity in order to eliminate the delays associated with standard mail delivery.
- To provide timely responses and possibly reduce some of the workload, please consider posting status information on a website.
- Additionally, any applicant filing a "Notice of Intent" should be timely notified when they are covered under the general permit and authorized to proceed with their construction project. Even with a 48 hour time window for approvals, notification by mail may take an additional 4-5 days to reach the state's four corners.

These comments refer to issues unrelated to the current rulemaking. Those interested in initiating rulemaking may file a petition with the Department as described in chapter 561-5 of the Iowa Administrative Code. It is anticipated that the database of storm water permit authorizations issued by the Department will be placed on the Department's website in 2007.

Recommendation:

It is recommended that the rules proposed in the original notice of intended action be modified to include one addition. This change is recommended after all comments were assessed and is as follows:

Add the following language at the end of the proposed paragraph 64.6(6)c:

...and the transferor's authorization issued under NPDES General Permit No. 2 for, and only for, the transferred property, shall be deemed by the department as being discontinued without further action of the transferor.

This change does not affect the substance of the proposed rule but clarifies the intent of the Department.

The following is a list of the individuals and organizations that commented on the proposed rule changes during the public comment period.

Alliant Energy – James Klosterbuer
City of Altoona – Karen Oppelt
Belin Law Firm – Charles F. Becker
City of Des Moines – Carl W. Elshire
The Greater Iowa City Area Home Builders Association – Barbara Messer
Home Builders Association of Iowa – Flora A. Schmidt
MidAmerican Energy – Steven C. Guyer and Jon E. Kallen
Iowa Farm Bureau – Christina L. Gruenhagen